IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO.2 OF 2005

IN

TESTAMENTARY PETITION NO.675 OF 2003

Ravinder Kahanchand Nayar ...Petitioner

vs.

1. Shobha K. Nayar & another. ...Respondents.

Mr.M.G.Thakkar i/b. M/s.Pandya & Poonawala, for Petitioner.

Mr.D.H.Mehta with S.P.Kanuga, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 7th September,2006.

P.C.:-

1. This petition has been filed for revocation of the probate of the Will of the deceased Kahan Chand Lachhmandas Nayar who expired on 14.10.2002. The probate was granted on 3.8.2004. The admitted positions are that the petitioner Ravinder is son of the testator. The petition for probate was filed by Smt.Shobha Nayar who is daughter of testator. The petitioner Ravinder was duly cited. According to the record of the probate petition no.675 of 2003 the affidavit of service has been filed on behalf of Smt.Shobha who

was the petitioner in that petition stating therein that the notice of the probate petition has been duly served on the petitioner Ravinder through the Court. A copy of the letter issued from the Postal authority was also annexed. That letter from the postal authority states that the packet addressed to the petitioner Ravinder at his usual place of residence was handed over to him on 27.12.2003.

2. The petitioner by this petition seeks order of revocation of the probate on two grounds. The first ground is that according to the record of the probate petition, the notice of the petition was served on 23.12.2003. According to him, he was out of Delhi and he had gone on holidays alongwith the family to Rajasthan from 22.12.2003 to 2.1.2004. He also states that during the course of the proceedings in Suit no.420 of 2004 filed by his brother by name Kuldeep, he had come to know that the probate petition has been filed by Smt.Shobha and that a copy of that petition was delivered to his lawyer by the lawyer appearing for Smt.Shobha on 10.3.2004. Thus, according to the petitioner, the notice of the probate petition was not served on him in accordance with the provisions of the Rules framed by this Court and therefore, the probate granted is liable to be revoked. The second ground on which the revocation of the probate is sought is that the Will of which the probate has been granted though signed by the testator, the signature of the testator is not attested by two witnesses as required by Law. Similarly the second codicil though again duly signed by the testator, the signature of the testator is not attested by any witness and therefore, according to the petitioner,

for this reason also the probate is liable to be revoked.

3. According to the original petitioner Smt.Shobha who is respondent no.1 in this petition, the notice was duly served on the petitioner as can be seen from the letter from the postal authority on 27.12.2003. The present petition has been filed by the petitioner after taking inspection of the record of the probate petition which had letter from the postal authority on record and therefore, according to respondent no.1, the petitioner should have produced documentary evidence to show that the probate petition could not have been served on him on 27.12.2003 as stated in the letter of the postal authority. However, no documentary evidence has been produced. According to Respondent no.1, in any case, the probate petition was served on the petitioner on 10.3.2004 as stated by the petitioner himself in paragraph 6 of the petition. The probate was granted on 3.8.2004 and therefore, even at that stage it was open for the petitioner to file a caveat if he wanted to contest the grant of probate. It is further submitted that the petitioner was duly served with the probate petition twice, but he has not filed any caveat, and therefore, he cannot seek revocation of probate on that ground.

4. It is submitted that though the Will is duly signed by the testator the signature is not attested by two witnesses, as the first codicil apart from being duly signed by the testator the signature is also attested by two witnesses, in view of the provisions of Section 64 of the Indian Succession Act, the Will is

valid. So far as the second codicil is concerned, it is submitted that the second codicil is duly signed by the testator and in the second codicil no change is made in disposition of the property of the deceased and therefore, the second codicil, really speaking, is not material.

5. At the time of hearing, the learned Counsel appearing for petitioner submitted that the petitioner be given time to produce the documents to show that he was not at his residence on 27.12.2003, but I declined to adjourn the proceeding for that reason. Firstly the petition was filed after taking inspection of the record of the probate petition and therefore, really speaking, if there is any document to show that the probate petition has not been served on the petitioner on 27.12.2003, it should have been produced alongwith the petition itself. In any case, it should have been produced alongwith the rejoinder which the petitioner has filed after the respondent no.1 had filed her affidavit specifically referring to the letter from the postal authority. Secondly, it is clear from the contents of the petition itself that the petitioner was served with the copy of the probate petition many months before the probate was granted. Therefore, it was open to the petitioner to apply to the Court to take his caveat on record by contending that the citation has not been served on him but as he has come to know about the probate petition he should be given an opportunity to contest it. The reference made to the Lawyer's advice that he need not to file any caveat, in my opinion, cannot be accepted.

6. So far as the merits of the matter are concerned, it is clear from the letter of the postal authority that the packet was delivered to the petitioner on 27.12.2003. The communication from the postal authority is a communication about the work done by the postal authority in regular course of business and therefore, it has presumptive value. The burden was entirely on the petitioner to prove that the petition was not served on him by the postal authority. Therefore, it was for the petitioner to produce evidence in support of his case both documentary and oral. In the absence of any documentary or oral evidence produced by the petitioner, the presumption attached to the communication from the postal authority is not dispelled and therefore, the case of the petitioner that he was not served with the probate petition cannot be accepted. The learned Counsel appearing for petitioner submits that the requirement of Rule 399 of the Rules framed by this Court is that the personal service is to be effected. According to him, the service made by the postal authority is not a personal service, therefore, granting of probate is vitiated. In my opinion, the submission is not well founded, because the purpose of laying down procedure is to comply with the principles of natural justice. The principles of natural justice would be complied with if the respondent is served with the copy of the probate petition either personally or through the postal authority or by any other usual mode. In paragraph (5) of the petition the petitioner has stated that during the course of proceedings in the Civil Suit no.420 of 2004, he came to know about filing of probate petition. He further states that he made inquiry at his residence to find out whether the citation was

served. The relevant portion from paragraph (5) reads as under:-

> "On going through Plaint in the above suit the Petitioner learnt about filing of the main Petition. The Petitioner immediately made inquiries at his residence and accordingly stated in his Affidavit in Reply to the above Notice of Motion, that the citation and main Petition were not served upon him. The Respondent No.2 in his Rejoinder to the said Affidavit inter alia stated that the Respondent No.2 had learnt from Respondent No.1 that citations and main Petition were posted to the Petitioner by Registered A.D. and they were deemed to have been served. The Petitioner craves leave to refer to the papers and proceedings in the above Suit and Notice of Motion when produced for its true meaning, scope and legal effect thereof. "

Thus, the petitioner much before 3rd August, 2004, the date when the probate was granted, came to know not only that the probate petition has been filed but he also came to know from the affidavit of respondent no.2 that respondent no.1 who was the petitioner in the probate petition had served the citation in that petition on the petitioner. In my opinion, therefore, it was the duty of the petitioner, if according to him he had not received the copy, to take inspection of the record of the probate petition to find out as to on what basis the present respondent no.1 is claiming in that petition that the citation has been served on him. The statement made in paragraph 13 in this petition that after his lawyer was served with the copy of the probate petition, he did not file the caveat

because his lawyer advised him that it is not necessary to file caveat because he has not been served with the citation in the main petition, cannot be believed because when the petitioner learnt by the affidavit filed by the respondent no.2 that according to respondent no.1 the petitioner has been served with the citation, no lawyer would have advised the petitioner, without verifying on what basis the respondent no.1 is claiming that the petitioner has been served with the copy of the petition, not to file caveat even after receiving the copy of the probate petition. In my opinion, therefore, there is considerable substance in the submission made on behalf of the respondent no.1 that all these reasons given by the petitioner are afterthought.

7. So far as the challenge to the validity of the Will and Codicils is concerned, perusal of the Will and the Codicils show that the Will is admittedly signed by the testator but the signature of the testator is not attested by two witnesses as required by Law. The first codicil dated 28.7.1994 is also signed by the testator and the signature of the testator is attested by two witnesses. It is stated in that Codicil that it became necessary for the testator to make this Codicil because of the death of his wife on 26.7.1994. By the second codicil he bequeathed his entire share in the joint family property to his daughter Shobha Nayar. There is no doubt that so far as the first codicil is concerned, it is valid because it is admittedly signed by the testator and the signature is also attested by two witnesses. It is also clear from the first Codicil dated 28.7.1994 that the Will made by the testator is specifically referred to in it and it is stated that the

testator is making modification as it becomes necessary because of the death of his wife. Section 64 of the Indian Succession Act is relevant which reads as under:-

> "64. Incorporation of papers by reference.- If a testator, in a Will or codicil duly attested, refers to any other document the actually written as expressing any part of his intentions, such document shall be deemed to form a part of the Will or codicil in which it is referred to."

Perusal of Section 64 of the Act makes it clear that if in a valid Will or codicil a document which is in writing and is in existence on the date on which the valid Will or codicil is executed is referred to, then even though the document which may not be duly signed or may not be duly attested, becomes part of the valid Will or codicil. Therefore, as the first codicil dated 28.7.1994 is validly executed codicil and it refers to the Will in terms, the Will will be a document in writing expressing intention of the testator and therefore, though on the Will the signature of the testator is not attested by two witnesses it will get incorporated in the first codicil and therefore, the Will will be the part of the first codicil.

8. So far as the second codicil is concerned, it is also admittedly signed by the testator but the signature is not attested by witnesses. It is also not obviously referred to in the first codicil and therefore, the second codicil, under the provisions of the Act, cannot be said to be valid. However, in my opinion, for that reason it is not necessary to revoke the probate because the

second codicil does not bring out any change so far as disposition of the share of the testator is concerned. By the first codicil the testator has bequeathed his share in the joint family property to his daughter Shobha. In the second codicil he states that because of subsequent amendment made by the Maharashtra legislature in the Hindu Succession Act now his daughter Shobha also has share alongwith his two sons and therefore, now instead of 1/3rd share in the joint family property he will have 1/4th share and therefore, on his death his 1/4th share will go to his daughter. What would be the extent of share of the testator in the Will is not the matter to be decided in the probate petition and the purpose of the second codicil is only to define the share of the testator in the estate. The intention of the testator expressed in the first codicil that his share in the joint family property will go entirely to the daughter, is not changed or modified by the second codicil. In my opinion, it is not necessary to revoke the probate of the Will granted by this Court for the aforesaid reason.

9. Thus, I find no reason to revoke the probate of the Will granted by this Court. The miscellaneous petition is disposed of. The petitioner is directed to pay cost of this petition to the respondents as incurred by the respondents. At the request of the petitioner operation of the interim order which is presently operating in the petition is continued for a period of Four weeks.